

CASE NO. 13-20-00280-CR

IN THE COURT OF APPEALS
FOR THE THIRTEENTH JUDICIAL DISTRICT
AT CORPUS CHRISTI, TEXAS
FILED IN
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KATHY S. MILLS
Clerk

ELIJAH TATES

VS.

STATE OF TEXAS

Appeal from the 85th Judicial District Court of
Brazos County, Texas
Cause No. 16-05720-CRF-85

REPLY BRIEF OF APPELLANT

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ORAL ARGUMENT REQUESTED

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Reply Point

Tates appeared by remote video conferencing at the punishment phase of his trial, violating his rights to be personally present for trial under the Fifth, Sixth and Fourteenth Amendments of the United States Constitution, Art. I, Sections 10 and 19 of the Texas Constitution and Art. 33.03 of the Texas Code of Criminal Procedure

(Response to State's Brief on Issue Two)

The State acknowledges this issue is of first impression and, tacitly, that affirmative waiver was required for procedural default. *See, e.g., Marin v. State*, 851 S.W.2d 275 (Tex. Crim. App. 1997); (State's Brief, pg. 25). Additionally, the State acknowledges Tate was not physically present for the punishment phase of his trial.

The State cites *Cervantes v. State*, 594 S.W.3d 667 (Tex. App. – Waco 2019, no pet.) in support. That case, originating from Brazos County, “exceptional circumstances” were found by the trial court to allow the testimony of a non-party, collateral witness by video conferencing. *Id.* at 670. The witness presented extraneous bad act testimony. *Id.* at 670. The witness lived in Wichita, Kansas and was unable to attend because she was a single mother of five children, including a breast-feeding newborn. *Id.* at 670. These reasons were cited by the trial court in a pre-trial hearing setting to overrule a defense objection to the remote video testimony of the witness. *Id.*

Cervantes is not applicable to this case. The legal issue in that case was Constitutional confrontation, and not Constitutional effective assistance, and due process. The factual differences are also significant. *Cervantes* involved a non-material,

extraneous act witness, rather than the defendant whose punishment was the subject of the trial. Further, the trial court in *Cervantes* made specific findings prior to trial concerning the “exceptional circumstances” that existed to allowed remote testimony from this non-essential witness.¹

None of those findings are of record in this case. For example, the Trial Court did not explain, nor find why all other participants in this critical stage of trial were allowed to appear, what protection protocols were sufficient for those trial participant’s personal physical presence in the courtroom, yet insufficient for Tate, the most important of all the participants.

By analogy, Texas law not only requires the presence of a defendant at all phases of trial, TEX. CODE CRIM. PRO. Art. 33.03, but unless affirmatively consented to, the physical presence of testifying forensic analysts at trials. *See*, TEX. CODE CRIM. PRO. Art. 38.076(b)(1). Article 38.076(b)(1) specifically reads “The use of video teleconferencing must be approved by the court and all parties.” Article 38.076 demonstrates the legislative importance of this specific class of witness and their elevated importance in criminal prosecutions.

¹ *Cervantes*, and the State’s Brief, cite *Maryland v. Craig*, 497 U.S. 836, 845 S.Ct. 3157 (1990). (State’s Brief, pg. 24.) *Craig* was also a Confrontation case, upholding a Maryland statute allowing remote video-conferencing of child complainants testimony if a particularized showing of elevated trauma to the child complainant is tied to the defendants presence in the courtroom. *Id.* at 855. This is not applicable to the legal issue in this case and no factual showing was made by the State or finding by the Trial Court concerning why Tate could not be physically present in the courtroom with his lawyer, the prosecutors and the judge.

The rest of the cases relied on in the State’s Brief are distinguishable. *In the Interests of D.C., A Child*, No. 04-04-00928, 2005 WL 1750130 (Tex. App. – San Antonio, July 27, 2005, pet. denied) (not designated for publication), was a civil case, the appellant was *pro se*, and “[F]ailed to raise a substantial question for appellate review that has an arguable basis either in law or fact.” *Id.* at 1 (citation omitted).

The Court of Appeals in that case found the *pro se* litigant “[F]ailed to raise any objection in the trial court to attending the hearing by video conference, thereby waiving this issue on appeal.” *Id.* at fn. 2. Tate’s constitutionally dimensioned deprivation is different, his presence at trial is affirmatively required by statute, and the State acknowledges in their Brief that “[A] criminal defendant does not waive his right to be present at trial by failing to object.” State’s Brief at pg. 25.

If this class of witness is required to appear in person in criminal trials, unless affirmatively consented to, it is consistent with statutory construction principles that Article 33.03 required Tate’s physical, personal appearance at the punishment phase of his trial. TEX. CODE CRIM. PRO. Art. 33.03. Physical presence, as cited in Appellant’s Brief, has been required under the plain meaning of the statute by at least one other intermediate court of appeals. *Weber v. State*, 829 S.W.2d 394, 396 (Tex. App. – Beaumont 1992, no pet.) (“The accused must be personally present at trial.”).

Additionally, although the COVID-19 pandemic has radically changed the way courts have conducted the work of criminal justice around the State, neither the Governor, the Supreme Court of Texas, the Court of Criminal Appeals, nor the

Office of Court Administration can alter Constitutional or statutory provisions without running afoul of the Separation of Power provisions of the Texas Constitution. TEX. CONST. Art. II, § 1 (separation of powers); U.S. CONST. Amend. V, VI, XIV; TEX. CONST. Art. I, § 10 (federal and state due process, and effective assistance of counsel); TEX. CODE CRIM. PRO. Art. 33.03 (defendant's right to be present at all trials); *see, e.g. Perry v. State*, 483 S.W.3d 884 (Tex. Crim. App. 2016) (abuse of official capacity statute violated Separation of Powers Clause as applied to former governor/defendant exercise of veto power).

Also significant is that Brazos County has been conducting jury trials during the COVID outbreak. *See* Office of Court of Administration (“OCA”) list of approved jury trials, available at <https://www.txcourts.gov/court-coronavirus-information/approved-jury-trials/> (accessed November 9, 2020). According to the OCA, Brazos County has conducted fifteen jury trials since June 2020 to the date of filing this Reply Brief. Appellant requests this Court take judicial notice of these trials. Tate's punishment trial was to the bench; however, the point is Brazos County has developed protocols, approved by the OCA for COVID-19, and even in the setting of Tate's trial, all trial participants, except the most important, were physically present in the courtroom.

Tate should have been physically present to be able to seamlessly communicate with Trial Counsel. The instance of the single “breakout” cited by the State was prior to the start of evidence and was done at Trial Counsel's request.

Nothing of record indicates Tate knew, or was able to communicate he wanted to “breakout” in a “Zoom Room.” Tate would have been required, unlike if he was physically present, to literally interrupt Trial Court proceedings to ask to speak to his lawyer in a private “Zoom Room.”

Equally significant, no alternatives to communication between Trial Counsel and Tate appear of record. No record of positioning of video screens inside the Courtroom, as in *Cervantes* was made part of the evidentiary record. Tate was the only defense witness called at punishment. His testimony was critical and diluted as a result of his absence from the courtroom in delivery, substance, and nuance. A new punishment trial should be ordered.

Conclusion and Request for Relief

This Court should grant oral argument, and following submission, reverse and remand for a new trial, or in the alternative, a new punishment trial.

RESPECTFULLY SUBMITTED,

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